S.B.Civil Writ Petition NO.2130/2003

Alias Khan

vs

Sh.Mohammed Sabir & Ors.

DATE OF ORDER : - 4.1.2005

HON'BLE MR. PRAKASH TATIA,J.

Mr. S.G.Ojha, for the petitioner.
Mr.A.K.Rajvanshy, for the respondents.

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Heard learned counsel for the parties.

The petitioner is aggrieved against the order of the trial court dated 17th April, 2003 by which the trial court rejected the petitioner's application filed under Order 9 Rule 17 CPC seeking setting aside of the ex-parte order dated 27th Nov., 2001.

Brief facts of the case are that the non-petitioner Mohd. Sabir submitted election petition to challenge the petitioner's election as petitioner was elected as ward member of the Municipal Board, Ratangarh. The trial court passed the order to proceed ex-parte against the petitioner on 27th Nov., 2001. According to learned counsel for the petitioner, no summon of the election petition was ever served upon the

petitioner and the petitioner had no knowledge of the election petition. According to learned counsel for the petitioner, the trial court declared the service of the petitioner sufficient on the basis of the summon, which was issued for appearance on 27th Nov., 2001. According to learned counsel for the petitioner, the said summon was never offered to the petitioner nor he refused to accept the same. The said summon was never affixed on the outer door of the petitioner's house. Not only this, but the process server has not even mentioned, who were the attesting witnesses present when the said summon was offered to the petitioner. It is further pointed out that as per the report on summon, the summon was offered to the petitioner on 23rd Nov., 2001, but the report was made by the process server on 27th Nov., 2001. The trial court under the impression that since there are reports of the postman that petitioner is not found at his residence despite the postman's visits to the house of the petitioner for several times, therefore, the petitioner is residing at the address, which is given in the summon. The trial court further relied upon the report of the process server, who reported that when he went to the petitioner's house, the petitioner was at Jaipur. According to learned counsel for the petitioner, all those reports have not been proved by the non-petitioner by producing evidence and the reports, which were made in the back of the petitioner were accepted as correct.

Learned counsel for the non-petitioner (election petitioner) vehemently submitted that the petitioner is deliberately delaying the proceedings of the election petition and he had full knowledge of the election petition. The petitioner submitted the application for setting aside the ex-parte order after such an inordinate delay, therefore, the trial court was right in rejecting the application of the petitioner.

I considered the facts of the case and perused the documents placed on record. It is clear from the copy of the summon issued by the trial court that for the date 27th Nov., 2001 the first report of offering the summon to the petitioner is in different hand writing and it bears no signature of the process server. In the report made after thumb impression and signature of two witnesses, there is a report of the process server that summon was offered to the petitioner himself and when he refused then one of the copy of the summon was affixed on the outer door of the petitioner's house. The report is contrary to the report made on the top of the summon where the process server has not recorded that the petitioner was found in the house and he was offered the summon and he refused to accept the summon. There is no explanation that when summon was offered on 23rd Nov., 2001 then why the report was not made on the spot on 23rd Nov., 2001 itself. The report was made on 27th Nov., 2001, which is certainly not in the presence of the said attesting witness.

In view of the above, it appears that the court below has committed serious error in accepting the service of the petitioner as sufficient.

The trial court further accepted the reports, which only proves that petitioner was not available in house on various occasions then the trial court should not have drawn inference that the petitioner was residing on the address given in the summon Ex.3.

In view of the above, the writ petition of the petitioner deserves to be allowed, hence allowed. The order dated 17th April, 2003 is set aside. Both the parties shall appear before the trial court on the day already fixed by the trial court. It will be the duty of the petitioner to submit the copy of this order to the trial court. The trial court is requested to decide the election petition expeditiously within a period of three months from the first date before the trial court.

(Prakash Tatia), J.

c.p.goyal/-